

STATE OF MICHIGAN
COURT OF APPEALS

MEDICAL PLANNING CONSULTING, INC.,

UNPUBLISHED

June 13, 2000

Plaintiff/Counter-defendant-Appellant,

and

LINDA ULLRICH,

Plaintiff-Appellant,

v

No. 214018

Saginaw Circuit Court

LC No. 96-001567-CK

ST. MARY'S MEDICAL CENTER and MARK
THOMPSON,

Defendants/Counter-plaintiffs-
Appellees.

Before: Smolenski, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's grant of summary disposition of their defamation claim and a jury verdict of no cause of action on their breach of contract claim. We affirm.

I.

In 1984, plaintiff Medical Planning Consulting, Inc. (MPCI), through its president plaintiff Linda Ullrich (Ullrich), entered into an agreement with defendant St. Mary's Medical Center (St. Mary's). The agreement between MPCI and St. Mary's provided that MPCI would provide such services as it and St. Mary's "jointly shall deem necessary to obtain public assistance to pay the cost of medical services furnished to patients of [St. Mary's] who have been denied Medicaid or County Hospitalization." St. Mary's agreed to pay plaintiff MPCI thirty percent of the net funds received by St. Mary's for any patient assigned to MPCI. The agreement also provided that St. Mary's retained "the sole discretion to determine which patients shall be assigned to [MPCI]." Finally, the agreement included a provision to allow St. Mary's to terminate it upon one-year's notice.

This case arose from a dispute regarding whether MPCl was entitled to receive compensation for collection efforts on behalf of one Frances Davis, who had a hospital bill, incurred in 1993, in excess of \$32,000. Mary Neuchterlein, St. Mary's patient accounts manager, testified that when uninsured patients were admitted to St. Mary's, the hospital would try to obtain coverage through the appropriate county department of social services. If coverage was denied, then St. Mary's would turn the case over to MPCl. When a patient had multiple admissions, St. Mary's would look at each admission as a separate admission, and would not turn the file over to MPCl until that particular admission had been denied. Neuchterlein testified that Davis was admitted on May 10, 1992 and August 12, 1992, and that St. Mary's assigned both of those admissions to plaintiff MPCl. Neuchterlein also testified that Davis had another admission on October 24, 1993; however, St. Mary's did not refer the October 24, 1993 admission to MPCl because public aid was not denied.

Ullrich gave a somewhat different account with respect to the treatment of Davis' admissions under the parties agreement. Ullrich testified that under the agreement, MPCl was assigned patients who have been denied medical assistance rather than assigned "admissions" or "accounts." Ullrich testified that Davis was admitted to St. Mary's seven times, with the last admission occurring on October 25, 1993.¹ Although Ullrich's testimony is not entirely clear, it appears that Davis' previous admissions had to be approved by the appropriate department of social services in order to obtain approval of her final admission. Ullrich further testified that she was working on the Davis file as late as April 1994.

The crux of the parties' dispute is whether Ullrich's actions in making a notation on the record of Davis' October 1993 admission breached the contract between MPCl and St. Mary's. Ullrich testified that in June 1994 she received a call from Lorie Zoltof at St. Mary's advising her that one of her accounts paid and that St. Mary's had a \$9,000 check for her. On June 6, 1994, when Ullrich went to pick up the check, Zoltof told her that the account, i.e., Davis' October 1993 admission, had not been assigned to MPCl. Ullrich testified that she was not aware of this admission. After Zoltof brought her Davis' file, which indicated that St. Mary's had applied for Medicaid on the admission, Ullrich placed the following note on the file:

on 2-25-93 this account per Mrs. Samples [a caseworker with whom Ullrich worked regarding Davis' other admissions] exempted because of the state office MOST program. Case had not been approved due to the above until 2 of '94."²

Ullrich characterized her notes as "an explanation" rather than a bill or voucher.

¹ As noted above, other evidence indicated that Davis' final admission occurred on October 24, 1993.

² It appears from Ullrich's testimony that public aid payments would not be made until the "MOST" code was removed.

Neuchterlein testified that she met with Ullrich and asked her why she was writing on the file. According to Neuchterlein, Ullrich said that she felt that this was her file because she had been working on the other Davis accounts. Neuchterlein told her that this was not correct because St. Mary's never received a denial on the file and that Ullrich should not have written on a patient file that was not assigned to her.

Defendant Mark Thompson, vice-president of finance for St. Mary's, considered Ullrich's action to be a breach of the agreement with MPCl and terminated the agreement without one-year's notice. MPCl subsequently retained an attorney, Mr. Prine, to represent it in the dispute. Prine wrote a letter to St. Mary's threatening to file suit for breach of contract for violating the one-year termination provision. Thompson responded in a letter in which he stated that Ullrich's services were discontinued "because she retrospectively altered patient billing records in an attempt to gain financial benefit for MPCl[I]" and attempted to defraud St. Mary's.

Plaintiffs subsequently filed a four-count amended complaint against defendants. In count one, plaintiffs alleged breach of contract against defendant St. Mary's. In count two, plaintiffs alleged defamation against defendant Thompson for the statements made in his letter to Prine. In count three, plaintiffs alleged tortious interference with their contract against Jerry Rose, one of defendant St. Mary's administrators. Finally, in count four, entitled "promissory estoppel," plaintiffs alleged that they were entitled to damages for defendant's oral assurance with respect to the one-year notice. Defendants filed a counterclaim for indemnification under the contract. The trial court dismissed counts three and four pursuant to the parties' stipulations. The trial court also granted defendant Thompson's motion for summary disposition with respect to count two. At trial, the jury reached a verdict in favor of St. Mary's on the remaining count for breach of contract. The trial court denied plaintiffs' motions for a new trial and judgment notwithstanding the verdict (JNOV). Plaintiffs appeal as of right.

II.

In its first issue on appeal, MPCl contends that the trial court committed error when it failed to direct a verdict for it on the issues of whether a contract existed and whether defendant had breached the contract. We review the trial court's denial of a motion for a directed verdict *de novo*, viewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Chiles v Machine Shop, Inc.*, 238 Mich App 462, 469; 606 NW2d 398 (1999). "The denial of a motion for a directed verdict or JNOV is reviewed to determine whether the nonmoving party failed to establish a claim as a matter of law." *Id.* While MPCl contends that the trial court should have granted its motion for directed verdict on its breach of contract claim, MPCl admits in its brief that a question of fact remained "whether [defendant St. Mary's] can show that there was a material breach by [plaintiff MPCl] which formed the legal defense for [d]efendant's breach." MPCl has admitted that it failed to establish its claim as a matter of law. Consequently, we hold that the trial court did not err in denying the motion for directed verdict.

III.

Next, plaintiff MPCCI contends that the trial court abused its discretion in denying MPCCI's motion for a new trial. A trial court may grant a party's motion for a new trial if the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). This Court reviews a trial court's decision to deny a motion for a new trial for an abuse of discretion. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 490; 593 NW2d 180 (1999). "An abuse of discretion occurs when an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the trial court's ruling." *In re Condemnation of Private Property for Hwy Purposes (Dep't of Transportation v. Randolph)*, 228 Mich App 91, 94; 576 NW2d 719 (1998).

In its order denying MPCCI's motion for a new trial, the court found "that no misrepresentation of fact was ever made" by Ullrich, and that "[t]here is absolutely no credible testimony or evidence that there was any thought of, let alone action taken toward, obtaining a fee through improper or fraudulent means." Nonetheless, the trial court found sufficient evidence to support the jury's finding that MPCCI had committed a material breach of the contract:

Under the totality of circumstances, the jury could conclude that the actions of Ms. Ullrich in reviewing a hospital file arguably subject to the rules of patient confidentiality and to which she clearly was not entitled, had not worked on, did not need for any purpose, and which had not been denied payment by Medicaid, in combination with placing notations on that file, that advanced a theory for payment not contemplated by the parties or supported by any reasonable interpretation of the contract, and which ultimately resulted in a total violation of and loss of trust, committed a material breach of the contract. This was for the jury to decide, and while the question is close, the Court cannot say there was insufficient evidence to support such a determination.

MPCCI contends that the trial court abused its discretion in determining that, under the totality of the circumstances, the jury could conclude that plaintiff Ullrich's actions constituted a material breach of the contract. MPCCI points out three "circumstances" that it claims are unsupported by the evidence. First, no patient confidentiality was breached. Second, the notation on the record did not constitute a breach. Third, Ullrich did not alter the records. MPCCI's contentions are without merit. With respect to the first circumstance, the trial court did not disregard "uncontested evidence" that Davis' release did not expire until November 14, 1994. Neuchterlein testified that Davis' release was not dated November 18, 1993; rather, the release was dated November 18, 1992 and expired on November 18, 1993.³ With respect to the second circumstance, the trial court did not rely on Ullrich's June 6, 1994 file notation as a material breach, but as merely one of the circumstances that the jurors could rely upon in finding a breach. Finally, with respect to the third circumstance, while MPCCI denies that Ullrich altered Davis' records, the trial court did not find that Ullrich altered the records. Rather, the court stated that Ullrich placed notations on the file. Accordingly, we hold that the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial.

³ Although the release was admitted as plaintiffs' exhibit 27, the record does not include a copy of it.

IV.

Next, plaintiffs claim that trial court erred in denying their motion for a JNOV. This Court reviews de novo a trial court's ruling on a motion for JNOV. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). “In reviewing a trial court’s denial of judgment notwithstanding the verdict, this Court should inquire whether the jury’s verdict was against the great weight of the evidence.” *Stallworth v Hazel*, 167 Mich App 345, 350; 421 NW2d 685 (1988). When we review a trial court’s failure to grant a defendant’s motion for a JNOV, we examine the testimony and all legitimate inferences therefrom in the light most favorable to the plaintiff. See *Scott v Illinois Tool Works*, 217 Mich App 35, 39; 550 NW2d 809 (1996). The verdict must stand if reasonable jurors could have reached different conclusions. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

Plaintiffs contend that the jury’s verdict was against the great weight of the evidence because defendants presented no evidence that plaintiff Ullrich committed or attempted to commit fraud. Plaintiff’s contention is without merit. The trial court instructed the jurors that in order to relieve St. Mary’s of its obligation under the one-year notice of termination provisions, it had the burden of proving that MPCCI breached the contract and that the breach was material. While the trial court further instructed the jury that MPCCI “has argued that a reason it should be excused from its obligations under the contract is because the plaintiff made certain misrepresentations in an attempt to obtain a fee to which it was not entitled,” the court also instructed the jury that

There is no single definition of a material breach of contract. Whether there has been a material breach is for you to determine based upon all of the facts and circumstances of the case. Among the factors you may consider are the nature and terms of the contract, the duties and obligations placed upon the parties, the relationship of the parties, the course of dealing between the parties, the nature and extent of the breach, the hardship caused, and any bad faith of the breaching party.

Given these instructions, the jury could have found that St. Mary’s established that a material breach occurred for a reason other than fraud or misrepresentation. Accordingly, we hold that the jury’s verdict was not against the great weight of the evidence.

V.

Next, plaintiff Ullrich contends that the trial court erred when it dismissed her defamation claim against defendant Thompson pursuant to MCR 2.116(C)(10). The trial court’s ruling on a motion for summary disposition is reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable

to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).]

In *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998), this Court identified the four elements of defamation as:

(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod).

We agree with the trial court that Ullrich invited the allegedly defamatory statement. Initially, we reject Ullrich's claim that Thompson's communication to Prine constituted sufficient publication of a defamatory remark. In support of her claim, Ullrich cites *Ball v White*, 3 Mich App 579, 584; 143 NW2d 188 (1966), in which this Court held that a letter from an attorney to an employer, accusing certain employees of theft, was publication sufficient to support a libel claim. However, the rule announced in *Ball* does not apply here. While Michigan law treats a corporation as entirely separate from its shareholders, "the complete identity of interest between the sole shareholder and the corporation may lead the court to treat them as one for certain purposes." *Industrial Steel Stamping, Inc v Erie State Bank*, 167 Mich App 687, 692; 423 NW2d 317 (1988). This treatment is commonly referred to as piercing the corporate veil. See *Williams v American Title Ins Co*, 83 Mich App 686, 697-698; 269 NW2d 481 (1978). As a general rule, a corporate veil will not be pierced absent fraud, sham or other improper use of the corporate form, *id.* at 697, or to accomplish a just result, *Industrial Steel, supra* at 692. Ullrich was the sole shareholder, officer and employee of MPCCI. While MPCCI retained Prine as its attorney to collect damages for defendants' alleged breach of contract, the evidence indicates that Ullrich performed the disputed work for St. Mary's and directed Prine's activity on behalf of the corporation. Under the facts in this case, we find that the trial court properly treated Ullrich and MPCCI as one in resolving Ullrich's defamation claim against Thompson.

We agree with the trial court that Prine's letter dated January 13, 1995, invited the alleged defamatory statements when he alleged that Thompson reneged on an offer allowing MPCCI to continue providing services and requested a response with respect to why "the hospital would terminate such a longstanding relationship without so much as any written notice to a company that they had done business with successfully for so many years."⁴ A communication regarding a person is absolutely

⁴ Prine's letter to Sister Joan Cuszurida of St. Mary's was written after Ullrich spoke to Cuszurida's assistant, and stated in pertinent part

(continued...)

privileged if the person consents to the communication. *Hollowell v Career Decisions, Inc*, 100 Mich App 561, 575; 298 NW2d 915 (1980). See, e.g., *Schechet v Kesten*, 3 Mich App 126, 130-134; 141 NW2d 641 (1966), in which this Court held that absolute privilege applied to allegedly libelous statements made by the chairman of hospital department of surgery in response to the plaintiff osteopath's letter requesting "in writing the specific list of charges" that led the hospital to require supervision of osteopath's surgical procedures. Accordingly, we hold that the trial court properly dismissed Ullrich's defamation claim because the alleged defamatory statement was not an unprivileged publication to a third party.

VI.

Next, MPCCI contends that the trial court erred in denying its motions for a JNOV and for a new trial on the ground that defense counsel's misconduct deprived MPCCI of a fair trial. In reviewing a trial court's denial of a motion for a JNOV, our inquiry involves the question of

(...continued)

It is further my understanding that following your assistant's most recent telephone conversation with Ms. Ullrich, she was contacted by Mark Thompson of the hospital, who was, to say the least, rather rude to Ms. Ullrich, and in fact first offered, and then reneged upon an opportunity for her corporation to continue providing its services to St. Mary's for at least another six months, if not for the full year contemplated by the notice provisions of the contract.

With this past background in mind . . . I am writing to you at this time to request your assistance in directing this correspondence to the appropriate person at the hospital. Please be advised that Medical Planning Consulting, Inc., has in fact retained my services to bring suit against the hospital in the event that this matter cannot be reconciled, but agreed with my recommendation that I should offer the hospital one last opportunity following retention of local counsel for this purpose to satisfactorily resolve this situation. It is my understanding that Medical Planning Consulting, Inc., has provided valuable services to the hospital over the last ten years without complaint by the hospital, and to the hospital's great financial benefit, and it is surprising to me that the hospital would terminate such a longstanding relationship without so much as any written notice to a company that they had done business with successfully for so many years, let alone [sic] the one year written notice required by the "Memorandum Agreement".

Should I not hear from a representative of the hospital within the next two weeks, I will presume that this letter will also go unanswered, and we will take appropriate steps to institute suit. Thank you for your anticipated cooperation and assistance in directing this correspondence to an appropriate hospital representative.

whether the jury's verdict was against the great weight of the evidence. *Stallworth, supra* at 350. However, because MPCCI presents no authority to support its claim that defense counsel's improper conduct entitles it to a JNOV, we deem this issue abandoned for failure to adequately brief it. *Dresden v Detroit Macomb Hospital Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996).

With respect to MPCCI's claim that the trial court erred in denying the motion for a new trial, we look to the applicable court rule, MCR 2.611(A), which provides in pertinent part:

(1) A new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:

(b) Misconduct of the jury or the prevailing party.

This Court reviews a trial court's denial of a motion for a new trial for an abuse of discretion. *McPeak, supra* at 490.

First, MPCCI contends that defense counsel improperly mentioned the dismissed defamation count in front of the jury. The trial court granted MPCCI's motion in limine that prevented defendants from mentioning to the jury that the court dismissed other counts raised by plaintiffs. However, during the trial, MPCCI's counsel, Mr. Mastromarco, raised the issues of fraud and defamation during his cross-examination of Thompson, which prompted an objection by defense counsel, Mr. Jungerheld:

Q. And in fact, let's not mince any words, Mr. Thompson, since we're talking about it, you went right out and called my client a fraud, didn't you?

A. I said she attempted to defraud St. Mary's.

Q. Attempted to defraud?

A. Uh-huh.

Q. Do you think that fraud carries with it a derogatory connotation?

MR. JUNGERHELD. Wait a minute. That portion of his claim was dismissed by this Court, and I knew he would get into this.

THE COURT. I will sustain then.

MR. MASTROMARCO. Approach, please, Your Honor. May I approach the bench?

THE COURT. Yes.

(Bench conference)

THE COURT. Okay. I will overrule the objection. You may inquire.

Following the trial court's ruling, both MPCI's counsel and defense counsel elicited testimony from Thompson on the fraud issue.

In denying MPCI's motion for a new trial, the court concluded that defense counsel's objection and remark did not mandate a new trial. In reaching its determination, the trial court noted that "it was the wording of plaintiff counsel's question that arguably raised the specter of the previously dismissed claim of defamation and triggered the now complained of objection." We agree with the trial court that MPCI's counsel cannot elicit testimony from a witness regarding improper evidence and then complain that defense counsel referred to the improper evidence in objecting to the line of questioning. Cf. *People v Brocato*, 17 Mich App 277, 305; 169 NW2d 483 (1969) ("[c]ounsel cannot sit back and harbor error to be used as an appellate parachute in the event of jury failure").

Second, MPCI contends that defense counsel engaged in misconduct by making improper remarks during closing argument, specifically that MPCI's counsel had a strong personality, which implied that counsel dominated Neuchterlein, a defense witness with a weak personality. The record indicates that defense counsel referred to MPCI's counsel as having a "strong personality" and being "a very good attorney," and that Neuchterlein "was not a strong person." We do not believe that defense counsel's reference was improper or that the statements prejudiced the jury, who witnessed Neuchterlein's cross-examination. Furthermore, even if defense counsel's brief comments were improper, a new trial is not necessary because the trial court instructed the jury that "[a]rguments, statements and remarks of attorneys are not evidence." See *Dunn v Lederle Laboratories*, 121 Mich App 73, 90-91; 328 NW2d 576 (1982) (even though defense counsel's remarks may have been improper, a new trial is not merited when the court gave proper jury instructions regarding the statements of attorneys). Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial.

Affirmed.

/s/ Michael R. Smolenski

/s/ Jane E. Markey

/s/ Peter D. O'Connell